A

Public Prosecutor v Chris Christian & Ors

B HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-45A-64–10 OF 2017
ROZANA ALI J
12 SEPTEMBER 2020

C *Criminal Law — Dangerous drugs — Trafficking — Accused charged with trafficking of methamphetamine — Whether prosecution succeeded in establishing prima facie case against all accused — Whether drugs were within definition under the Dangerous Drugs Act 1952 — Whether accused persons were in possession of drugs — Whether accused persons were trafficking in drugs* D *— Whether there was common intention — Whether case was proven beyond reasonable doubt — Whether defence of innocent carrier proven — Whether there was wilful blindness — Whether defence bare denial and afterthought — Criminal Procedure Code s 180(3) — Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2), (2A), 40A(1) — Penal Code s 34*
E

Evidence — Adverse inference — Failure of prosecution to call witness — Whether adverse inference ought to be invoked against prosecution for non-calling of several individuals as witnesses — Evidence Act 1950 s 114(g)

F

In the present case, a police team led by PW2 had arrested all the three accused in a car while they were the midst of selling drugs to PW3 who acted as an agent provocateur ('AP'). DW4 in the present case assisted PW3 as the purchaser of the drugs. PW2 seized from the first accused a plastic bag ('P8') containing two G boxes ('P9') where each of the boxes containing two plastic packets of drugs, as subsequently confirmed by the chemist ('PW1') in the chemist reports ('P6'). It ought to be noted that prior to P6, there was another report ('P20') prepared by PW1 but there was typo error in P20 which led PW1 to amend the error and marked the new report as P6 as tendered in court. All the accused were then H charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the DDA read together with s 34 of the Penal Code for trafficking 720.7g of methamphetamine ('the drugs'). The defence of all the three accused were as followed: (a) the first accused contended that he was only assisting his friend Sylvester Chima ('Sylvester') to hand over P8 to I someone not known to him and he was an innocent carrier; and (b) the second and third accused contended that they were not present during the first meeting and that they followed the first accused to the car to get a lift to Setapak Sentral Mall. The issues to be determined were: (i) whether the prosecution had succeeded in establishing a prima facie case against all the accused; (ii) whether

the drugs were within the definition under the DDA ('the first element'); (iii) whether the accused persons were in possession of the drugs ('the second element'); (iv) whether adverse inference ought to be invoked against the prosecution for non-calling of several individuals as witnesses ('the named persons'); (v) whether the accused persons were trafficking in the drugs ('the third element'); (vi) whether there was common intention; and (vii) whether the case was proven beyond reasonable doubt.

Held, convicting all the accused as per the charge and sentencing all the accused to death by hanging:

(1) The drugs were sent for analysis by PW1 and the result of the analysis was as stated in P6 where it was confirmed that the drugs seized were methamphetamine, a drug listed in the first schedule to the DDA, with a net weight of 720.7g. In relation to the chemist reports, the court found that P6 and P20 were consistent and identical. The error in the report was only a typo error and was not material mistake as to negate the first element. Further, based on the evidence, the court found that the chain of evidence was not broken. The court was satisfied that the drugs produced in the court were the same drugs seized by PW2. The first element was therefore proven (see paras 14–15)

(2) There was no material discrepancy as to the evidence adduced by PW2 and PW3 in respect of the identities and involvement of all the three accused. The court accepted the evidence of PW3 as admissible and was one worthy of credit as provided under s 40A(1) of the DDA. Based on the evidence, the act of the first accused in bringing the bag without doubts constituted possession of the said drugs and the act of the second accused and the third accused who actively involved in making such transaction indicated their knowledge of the impugned drugs. The court held that there was clear evidence that at all material time, all the three accused had not only the knowledge of the drugs in the bag including the nature of the drugs but also, they had full and exclusive control and custody of the said drugs (see paras 17–18 & 21).

(3) There was no basis to invoke adverse inference rule under s 114(g) of the Evidence Act 1950 against the prosecution for the non-calling of the named persons as witnesses. If there was no gap in the prosecution's case, no adverse inference could be invoked against the prosecution. There was no suppression of the would-be evidence of those named persons by the prosecution to justify the invocation of the adverse inference rule (see para 25).

(4) The testimony of PW1 confirmed that the net weight of the drugs after analysis were 720.7g of methamphetamine. On the facts and circumstances of the case including the quantity of the drugs and the transaction where the three accused actively involved to conclude the sale

of the drugs with PW3, the court found that there was a direct evidence of trafficking by all the three accused in the selling of the drugs as provided for under the definition in s 2 of the DDA (see para 28).

(5) Based on the evidence, the second accused and the third accused attended the first meeting with PW3 and arranged for the delivery of the drugs by the first accused. It was reasonable to conclude that all the accused knew each other prior to the first meeting. During the first meeting, the first accused had brought the bag to PW3 and subsequently showed the drugs to PW3 in the presence of the second accused and the third accused. With these evidence, the court found that the prosecution had proven common intention under s 34 of the Penal Code on the part of all the accused persons with respect of the charge. Upon maximum evaluation of the evidence and for the reasons stated above, the court found that the prosecution had proven prima facie case against all the three accused in respect of the charge pursuant to s 180(3) of the Criminal Procedure Code (see paras 30 & 32).

(6) Based on the evidence, the first accused did not make any inquiries from Sylvester as to the contents of P8 and neither did he have the trouble to inspect the two boxes. The court was unable to accept the defence of innocent carrier by the first accused. By applying the principle of 'wilful blindness', the first accused was taken to know that he was carrying the drugs. The defences of the second and third accused were just bare denials and afterthoughts considering the evidence of PW3 and DW4 which confirmed the facts that there was a first meeting with the second and third accused. Further, it was incomprehensible for a normal person to ask a lift from someone whom they had never met or had no prior acquaintances. The defence of the three accused had failed to raise a reasonable doubt on the prosecution's case and therefore the prosecution had proven its case beyond reasonable doubt (see paras 41–42, 44–45 & 48).

(7) There was no material upon which the court could have exercised a discretion under s 39B(2) and (2A) of the DDA to pass a sentence of life imprisonment and whipping since there was an involvement of agent provocateur (see para 50).

[Bahasa Malaysia summary

Dalam kes ini, sepasukan polis yang diketuai oleh PW2 telah menahan ketiga-tiga tertuduh di dalam sebuah kereta ketika mereka sedang menjual dadah kepada PW3 yang bertindak sebagai ejen perangkap ('EP'). DW4 dalam kes ini membantu PW3 sebagai pembeli dadah tersebut. PW2 merampas dari tertuduh pertama sebuah beg plastik ('P8') yang berisi dua kotak ('P9') di mana setiap kotak berisi dua paket plastik dadah, seperti yang kemudiannya disahkan oleh ahli kimia ('PW1') dalam laporan ahli kimia ('P6'). Harus

diingatkan bahawa sebelum P6, terdapat laporan lain ('P20') yang disiapkan oleh PW1 tetapi terdapat kesalahan ejaan dalam P20 yang menyebabkan PW1 membetulkan kesalahan tersebut dan menandakan laporan baru sebagai P6 sebagaimana yang di kemukakan di mahkamah. Semua tertuduh kemudian didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) ADB yang dibaca bersama dengan s 34 Kanun Keseksaan kerana memperedar 720.7g methamphetamine ('dadah tersebut'). Pembelaan ketiga-tiga tertuduh adalah seperti berikut: (a) tertuduh pertama menyatakan bahawa dia hanya membantu rakannya Sylvester Chima ('Sylvester') untuk menyerahkan P8 kepada seseorang yang dia tidak kenali dan dia adalah pembawa yang tidak bersalah; dan (b) tertuduh kedua dan ketiga berhujah bahawa mereka tidak hadir semasa perjumpaan pertama tersebut dan bahawa mereka mengikuti tertuduh pertama ke kereta untuk tumpang pergi ke Setapak Sentral Mall. Isu-isu yang perlu ditentukan adalah: (i) sama ada pihak pendakwaan berjaya membuktikan kes prima facie terhadap semua tertuduh; (ii) sama ada dadah tersebut adalah dadah dalam definisi di bawah ADB ('elemen pertama'); (iii) sama ada kesemua tertuduh mempunyai milikan ke atas dadah tersebut ('elemen kedua'); (iv) sama ada inferens bertentangan harus dibuat terhadap pihak pendakwaan kerana tidak memanggil beberapa orang individu sebagai saksi ('orang yang dinamakan'); (v) sama ada tertuduh-tertuduh mengedar dadah ('elemen ketiga'); (vi) sama ada terdapat niat bersama; dan (vii) sama ada kes telah dibuktikan melampaui keraguan yang munasabah.

Diputuskan, mensabitkan tertuduh-tertuduh seperti dalam pertuduhan dan menjatuhkan hukuman gantung sampai mati ke atas tertuduh-tertuduh:

(1) Dadah tersebut telah dihantar untuk dianalisa oleh PW1 dan hasil analisanya adalah seperti yang dinyatakan dalam P6 di mana disahkan bahawa dadah yang disita adalah methamphetamine, dadah yang disenaraikan dalam jadual pertama ADB, dengan berat bersih 720.7g. Berkenaan dengan laporan ahli kimia, mahkamah mendapati bahawa P6 dan P20 adalah konsisten dan serupa. Kesalahan dalam laporan tersebut hanyalah kesalahan ejaan dan bukan kesalahan material sehingga boleh menyangkal elemen pertama. Selanjutnya, berdasarkan keterangan, mahkamah mendapati bahawa rantaian keterangan tidak putus. Mahkamah berpuas hati bahawa dadah yang dikemukakan di mahkamah adalah dadah yang sama yang disita oleh PW2. Oleh itu, elemen pertama telah dibuktikan (lihat perenggan 14–15).

(2) Tidak terdapat percanggahan material dalam keterangan yang dikemukakan oleh PW2 dan PW3 mengenai identiti dan keterlibatan ketiga-tiga tertuduh. Mahkamah menerima keterangan PW3 sebagai boleh diterima dan merupakan keterangan yang kredibel seperti yang diperuntukkan di bawah s 40A(1) ADB. Berdasarkan keterangan, tidak boleh disangkal bahawa tindakan tertuduh pertama yang membawa beg

telah menunjukkan pemilikan ke atas dadah tersebut dan tindakan tertuduh kedua dan tertuduh ketiga yang terlibat secara aktif dalam melakukan transaksi tersebut menunjukkan pengetahuan mereka mengenai dadah tersebut. Mahkamah berpendapat bahawa terdapat keterangan yang jelas bahawa pada semua masa yang material, ketiga-tiga tertuduh bukan sahaja mempunyai pengetahuan tentang dadah di dalam beg tersebut termasuk sifat dadah tersebut malahan juga, mereka mempunyai kawalan dan jagaan penuh dan eksklusif terhadap dadah tersebut (lihat perenggan 17–18 & 21).

(3) Tidak ada asas untuk menggunakan prinsip inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pendakwaan kerana tidak memanggil orang yang dinamakan sebagai saksi. Sekiranya tidak ada kelompongan dalam kes pendakwaan, tidak ada inferens bertentangan yang boleh dibuat terhadap pihak pendakwaan. Tidak terdapat penindasan terhadap keterangan yang akan diberikan oleh orang yang dinamakan oleh pihak pendakwaan untuk membenarkan pemakaian prinsip inferens bertentangan (lihat perenggan 25).

(4) Keterangan PW1 mengesahkan bahawa berat bersih dadah setelah analisa adalah 720.7g methamphetamine. Berdasarkan fakta dan keadaan kes termasuk kuantiti dadah dan urus niaga di mana ketiga-tiga tertuduh terlibat secara aktif untuk menyempurnakan penjualan dadah tersebut kepada PW3, mahkamah mendapati terdapat keterangan langsung pengedaran dadah oleh ketiga-tiga tertuduh dalam penjualan dadah tersebut seperti yang diperuntukkan di bawah definisi s 2 ADB (lihat perenggan 28).

(5) Berdasarkan keterangan, tertuduh kedua dan tertuduh ketiga menghadiri perjumpaan pertama dengan PW3 dan mengatur penghantaran dadah tersebut oleh tertuduh pertama. Adalah wajar untuk menyimpulkan bahawa semua tertuduh saling mengenali sebelum perjumpaan pertama. Semasa perjumpaan pertama, tertuduh pertama membawa beg tersebut kepada PW3 dan kemudian menunjukkan dadah tersebut kepada PW3 di hadapan tertuduh kedua dan tertuduh ketiga. Dengan keterangan ini, mahkamah mendapati bahawa pihak pendakwaan telah membuktikan niat bersama di bawah s 34 Kanun Keseksaan oleh semua tertuduh berkenaan dengan tuduhan tersebut. Setelah menilai keterangan secara maksimum dan atas alasan-alasan yang dinyatakan di atas, mahkamah mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap ketiga-tiga tertuduh berkenaan dengan pertuduhan berdasarkan s 180(3) Kanun Tatacara Jenayah (lihat perenggan 30 & 32).

(6) Berdasarkan keterangan, tertuduh pertama tidak bertanya kepada Sylvester mengenai isi kandungan P8 dan dia juga tidak menghadapi masalah untuk memeriksa kedua-dua kotak tersebut. Mahkamah tidak

dapat menerima pembelaan pembawa yang tidak bersalah oleh tertuduh pertama. Dengan menggunapakai prinsip 'wilful blindness', tertuduh pertama dianggap tahu bahawa dia membawa dadah tersebut. Pembelaan tertuduh kedua dan ketiga hanyalah penafian semata-mata dan pemikiran terkemudian apabila melihat kepada keterangan PW3 dan DW4 yang mengesahkan fakta bahawa terdapat perjumpaan pertama dengan tertuduh kedua dan ketiga. Selanjutnya, adalah tidak masuk akal bagi orang yang normal untuk menumpang seseorang yang mereka tidak pernah bertemu atau tidak kenal sebelumnya. Pembelaan ketiga-tiga tertuduh gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan oleh itu pihak pendakwa telah membuktikan kesnya melampaui keraguan yang munasabah (lihat perenggan 41–42, 44–45 & 48).

(7) Tidak ada alasan yang membolehkan mahkamah menggunakan budi bicara di bawah s 39B(2) dan (2A) ADB untuk menjatuhkan hukuman penjara seumur hidup dan sebatan kerana terdapat penglibatan ejen perangkap (lihat perenggan 50).]

Cases referred to

Ali Tan bin Abdullah v PP [2013] 2 MLJ 676; [2013] 4 CLJ 757, CA (refd)
Baharom v PP [1960] 1 MLJ 249; [1960] 1 LNS 9, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246; [1998] 4 CLJ 789, CA (refd)
Jeanette Congcan Opena v Pendakwa Raya [2014] MLJU 1919; [2014] 1 LNS 508, CA (refd)
Liew Siew & Anor v PP [1969] 2 MLJ 232; [1969] 1 LNS 90, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82, HC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Pendakwa Raya lwn Klong K'Djoanh [2016] MLJU 1644; [2016] 5 CLJ 533, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, FC (refd)
Roslan bin Sabu @ Omar v PP [2006] 5 MLJ 244; [2006] 3 CLJ 607; [2006] 4 AMR 772, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 1 LNS 654, CA (refd)
Suresh & Anor v State of Uttar Pradesh [2001] SC 1344, SC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180(3), 180(4), 182A
Dangerous Drugs (Special Preventive Measures) Act 1985
Dangerous Drugs Act 1952 ss 2, 39B, 39B(1)(a), (2), (2A), 40A(1), First Schedule
Evidence Act 1950 s 114(g)
Penal Code s 34

(The Law Office of LA Gomes and Meor Shaazizi & Assoc) for the first appellant.
(Sivanathan) for the second appellant.
(Rajpal, Firah & Vishnu) for third appellant.
(Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rozana Ali J:

INTRODUCTION

[1] All the three accused were charged under s 39B(1)(a) Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) DDA read together under s 34 of the Penal Code for trafficking dangerous drugs of methamphetamine with a nett weight of 720.7g.

[2] Based on information received, a police team led by PW2 (raiding officer) arrested all the three accused in a car while they were in the midst of selling drugs to PW3 who acted as an agent provocateur ('AP'). Prior to the arrest, the selling of the drugs to PW3 was arranged by OKT2 and OKT3. PW2 seized from OKT1 a plastic bag 'Jefferson Online' ('P8') containing two boxes labelled as 'Dry Cake Biscuits' ('P9') where in each of the boxes containing two plastic packets of drugs.

[3] At the end of the prosecution case, I find that the prosecution has made a prime facie case against all the three accused as charged and they were called to enter their defence. At the close of the defence case, I find the defence has failed to raise a reasonable doubt against the prosecution's case. All the three accused were convicted for the trafficking of dangerous drugs and were sentenced to death.

FACT OF THE CASE

[4] On 16 June 2017 at 11am, PW3 received information regarding drug trafficking syndicate involving African nationals at or around Danau Kota, Kuala Lumpur. Relying on the said information, at about 1pm PW3 acting as an AP contacted a person called 'boss' in Nigeria inquiring about buying of some drugs. 'Boss' directed PW3 to contact a person by the name of 'boy' by giving a telephone number to PW3. PW3 subsequently contacted 'boy' to

arrange for a meeting which was then fixed at 3pm in front of Restaurant NZ Rillil Sdn Bhd, Jalan Danau Niaga 1, Taman Danau, Kota Kuala Lumpur ('the restaurant'). PW3 then informed PW2 of such meeting and requested PW2 to standby with his raiding team.

[5] PW2 and his team together with PW3 assisted by DW4 waited for the meeting to take place in front of the restaurant. At about 3.35pm ('first meeting'), OKT2 followed by OKT3 approached and entered into a car Toyota Rush (CCM 7482) driven by the DW4 via the left rear door. OKT2 introduced himself as 'Boy' who earlier was in contact with SP3. OKT2 requested SP3 to show the money but instead SP3 asked OKT2 to first show the drugs prior making payment to OKT2. OKT2 agreed with the proposal and requested SP3 to wait at the same place for him to get the drugs from his friend. OKT2 and OKT3 then left the car.

[6] At about 5.35pm, OKT2 and OKT3 came back with OKT1 to the car (second meeting). OKT2 entered the car through the left rear door followed by OKT3 and OKT1. SP3 saw OKT1 was holding the bag with his right hand while OKT2 and OKT3 did not have anything with them. OKT1 then insisted SP3 to expedite the transaction after PW3 showed the money for the payment of the drugs.

[7] Upon receiving a signal from PW3, PW2 and his team then raided and arrested all the three accused while they were still in the car. At that material time, OKT1 was caught with a black and white plastic bag with a logo 'JS' written as Jefferson Online. In the said bag, PW2 found two boxes cream in colour written with 'Dry Cake Biscuit', each contain two packets of substance suspected as drugs. SP2 seized the bag and its content and brought all the three accused back to the Police Station Headquarters.

EVALUATION AND FINDINGS AT THE CLOSE OF PROSECUTION

[8] It is well-established that at the close of prosecution, this court is under a duty to determine whether the prosecution has succeeded in establishing a prima facie case against the accused. In performing this task, this court subject the evidence produced by the prosecution to a maximum evaluation and ask itself the ultimate question at this stage (see: s 180(4) of the Criminal Procedure Code and the cases of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85).

A ELEMENTS OF THE CHARGE

[9] At this stage it is incumbent on the prosecution to prove the following ingredients:

B (a) firstly, that the drugs are dangerous drugs within the meaning and definition of the DDA;

(b) secondly, that the accused persons were in possession of the impugned drugs; and

C (c) thirdly, that the accused persons were trafficking in the said drugs.

Whether the drugs are within the definition under the DDA

D **[10]** The drugs were sent for analysis and examination by the chemist, Encik Rahman bin Mamat ('PW1'). The result of the analysis was as stated in the chemist reports ('P6') that confirmed the drugs seized were methamphetamine, a drug listed in the First Schedule to the Dangerous Drugs Act 1952 ('the DDA'), with a net weight of 720.7g.

E *The typing error in the chemist reports*

[11] The defence contended there was tempering of chemist report P6 by PW1 as to the identity of the drugs which had resulted to the break in chain of F evidence.

[12] PW1 in his evidence explained to the court that he realised that there was a typo error in his report at para (b) of P20(a), (b) and (c) after he issued to PW5 (investigating officer). PW1 then amended para (b) without informing G PW5 and later produce in court marked the amended report as P6. The amendment at para (b) was the change of word 'SNC' instead of 'SNB'.

[13] PW1 testified and explained the reason for such amendment that it was done due to typo error. PW1 insisted that it was a genuine mistake which has H no bearing to his analysis of the drugs. This can clearly be seen in para (b) P20(a), (b) and (c) where the word 'SNC' refers to sequence of markings which is 'SNC1' and 'SNC2'. PW1 also affirmed that the contents of P20(a), (b) and (c) and P6 are the same (verbatim and seriatim) except for the change of word 'SNC' in P6.

I **[14]** I took note of P6 in relation to the typo error of the wording 'SNB' and 'SNC'. I accepted the explanation given by PW1 which was also supported by PW5 as to the marking of 'SNC' and 'SNB' in P6 and P20(a), (b) and (c). Having compared P6 and P20(a), (b) and (c) and carefully scrutinize the error

at para (b) of both reports, I did not find any material discrepancy or alteration in respect of the drugs itself in term of the number of items, weight, size and type including the analysis made by PW1. I also did not see any tampering of evidence took place. The two chemist reports (P6 and P20(a), (b) and (c)) were consistent and identical. Having taken the evidence into the consideration and parameters which I have alluded earlier, I am fully satisfied that it was only a typo error and is not a material mistake as to negate the first element.

Chain of evidence

[15] As to the chain of evidence, PW2 after the seizure of the exhibits, drawn up a search list ('P21') and placed markings on the exhibits before handing over to the PW5. The handover was also confirmed by the acknowledgement of handover list or *borang serah/terima barang kes* ('P23'). Thereafter the evidence showed the movement and safekeeping of the exhibits from the time it was sent to PW1 and until the production in this court. The combined testimonies of PW2 and PW5 as well as the requisite documentary evidence tendered showed the custody and movement of the exhibits from the time they were seized until it were produced in court. Further, the evidence of PW1, PW2, PW3, PW4 and PW5 together with the documentary evidence adduced and tendered concluded that the chain of evidence was not broken. I am satisfied that the exhibits produced in this court were the same drugs seized by PW2 during the raid and the arrest of the three accused. Therefore, I find that the prosecution has proved the first element of the offence under s 39B of the DDA.

The accused persons were in possession of the drugs

[16] The factual matrix of the case as presented by the prosecution is that PW3 acted as AP assisted by DW4 who played the role as the purchaser for the drug which had led to the arrest of the three accused by PW2 and his team on 16 June 2017. Prior to this, there were dealing made by OKT2 and OKT3 with PW3 in respect of the drug transactions during the first meeting. From the evidence, PW3 and DW4 who waited in a car Toyota Rush (CTM 7482) parked in front of the restaurant before the arrival of the three accused at 5.40pm. All the three accused were in the car when PW2 and his team conducted the raid and effected the arrest. The bag which contained the drugs was seized from OKT1.

[17] From the evidence adduced, PW3 was involved in the negotiation on the price and quantity of methamphetamine. PW3 and DW4 were present from the beginning until the three accused were arrested. The evidence show that all the three accused got into the car for the second meeting with PW3 through the rear left door where OKT1 was the last person to enter. OKT1 was sitting behind PW3 when he opened the bag which contained the drugs and

A subsequently showed to PW3. During the raid by PW2, OKT1 was sitting on the left behind seat of the car. OKT2 and OKT3 were also at the behind seat of the car. OKT2 and OKT3 were identified by PW3 from both meetings. I find that there is no material discrepancy as to the evidence adduced by PW2 and PW3 in respect of the identities and involvement of all the three accused.

B

[18] I am aware that the role of AP is the one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested (see also Federal Court case of *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141). I find that the evidence by PW3 is credible and there is no reason to say otherwise. There was no dispute that PW3 had acted as AP, culminating in the arrest of the three accused. Further, PW3 was one of the central figures in the unfolding of events in this case. PW3 has related the full story of what happened in his negotiation and transaction in respect of the drugs and any statements made by the three accused to him shall be admissible in evidence. Therefore, I accept the evidence of PW3 as admissible and is one worthy of credit as provided under s 40A (1) of the DDA.

C

D

E

[19] It is clear from the evidence that all the three accused came and entered into the car to meet PW3 and DW4. OKT1 was holding the bag which contained the impugned drugs which he showed to PW3 and DW4 in the presence of OKT2 and OKT3. It is reasonable to conclude here that OKT2 and OKT3 were fully aware and have full knowledge of such transaction. In fact, the arrangement for the transaction was negotiated and made by OKT2 and OKT3 earlier when they met PW3 on the first meeting.

F

[20] As far as whether all the three accused had knowledge or otherwise as to the existence of the impugned drugs, this could have easily been established by the evidence of PW3. It is a direct evidence of the negotiations that took place. This would undoubtedly include the type and weight of the drugs, the agreed price and the time, date and point of delivery. The evidence of PW3 showed that during the first meeting, OKT2 and OKT3 requested PW3 to show the money prior the delivery of the drugs. OKT2 even asked PW3 to wait at the place and also informed PW3 that his friend is preparing for the delivery of the drugs. On the second meeting, all the three accused went into the car where. OKT1 pressured PW3 to expedite the transaction in the presence of OKT2 and OKT3. In the car, OKT1 is the one who opened the box and showed its content to PW3.

G

H

I

[21] I am satisfied that OKT1 has the custody and control of the drugs and that all the three accused have full knowledge of the said drugs. The act of the OKT1 in bringing the bag without doubts constitutes possession of the said

drugs and the act of OKT2 and OKT3 who actively involved in making such transaction indicate their knowledge of the impugned drugs. It is my finding that there is clear evidence that at all material time, all the three accused had not only the knowledge of the drugs in the bag including the nature of the drugs but also, they had full and exclusive control and custody of the said drugs.

Adverse inference under s 114(g) Evidence Act 1950

[22] The defence submitted that an adverse inference under s 114(g) of the Evidence Act 1950 should be drawn against the prosecution for failing to call Sylvester Chima since he was the one who handed over P8 to OKT1 and subsequently delivered to PW3. The prosecution also failed to call lzucchukwu Orabueze; Ukaegbu Patrick lfesinachi and Amaechi Festus Chinedu who were arrested at about the same time and place when all the three accused were arrested. The prosecution has all the means to call them as witness since they were detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316).

[23] It is trite law that the discretion lies with the prosecution to call all such witnesses essential to the unfolding of the narrative upon which the prosecution's case is based. The unfolding of their narrative was sufficiently covered through the evidence of PW2, PW3 and PW5. The identity of all the three accused were positively identified and moreover they were arrest in the car during raid by PW2. As for failure to call the named persons mentioned as prosecution witnesses, in my view it has nothing to do with the charge against the three accused even though they were arrested at about the same time and later were placed under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). They were not arrest together with the three accused for possession or trafficking of dangerous drugs as they were not in the car when the arrest of the three accused took place.

[24] In any event, since the defence had a legal burden to discharge (to disprove knowledge) it was their duty to call Sylvester Chima or others to give evidence and not for the police to investigate if it was true that Sylvester Chima had asked OKT1 to carry P8 (see *Baharom v Public Prosecutor* [1960] 1 MLJ 249; [1960] 1 LNS 9; *Liew Siew & Anor v Public Prosecutor* [1969] 2 MLJ 232; [1969] 1 LNS 90; and *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246; [1998] 4 CLJ 789).

[25] Therefore there is no basis to invoke adverse inference rule under s 114(g) of the Evidence Act, 1950 against the prosecution for the non-calling of the named persons as witnesses. As long as there is no gap in the prosecution's case, no adverse inference could be invoked against the prosecution. I find that there was no suppression of the would-be evidence of those named persons by

A the prosecution to justify the invocation of the adverse inference rule.

The accused persons were trafficking the drugs

[26] There need not be actual sale to prove trafficking and this is clear from
B the definition of trafficking which is worded in s 2 of the DDA 1952 as such:

> 'Trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the
C authority of this Act or the regulations made under the Act.

[27] The Federal Court in the case of *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 as follows:

D > Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into. Judging from the manner the drug was been carried i.e., small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the
E > respondent was in fact carrying it for the purpose of trafficking.

[28] The testimony of PW1 confirmed that the net weight of the impugned drugs after analysis weighed 720.7g of methamphetamine. On the facts and circumstances of this case including the quantity of the drugs and the
F transaction where the three accused actively involved to conclude the sale of the drugs with PW3, I find that there was a direct evidence of trafficking by all the three accused in the selling of the drugs as provided for under the definition in s 2 DDA.

G *Common intention*

[29] Is there sufficient to show direct evidence of common intention or anything from which such common intention could be inferred by the three accused? The essence of the concept of common intention was explained in the
H Court of Appeal case of *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 1 LNS 654 by referring to what was said by Sethi J in the Indian case of *Suresh & Anor v State of Uttar Pradesh* [2001] SC 1344 as follows:

I > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had

done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

[30] Thus, whether there is common intention is a question of fact to be proved mainly by way of inference from circumstances. The evidence here is that OKT2 and OKT3 were the one who attended the first meeting with PW3 and arranged for the delivery of the drugs by OKT1. It is reasonable to conclude that all the accused knew each other prior to the first meeting at the car park as mentioned by the PW3. What had transpired in the car during the first meeting is that OKT1 had brought the bag to PW3 and subsequently showed the drugs to PW3 in the said car in the presence and involvement of OKT2 and OKT3. With these evidence, I find that the prosecution had proven common intention under s 34 Penal Code on the part of all the three accused persons with respect of the charge. I therefore hold that the prosecution has proven that the act of selling the drugs to the AP was done with common intention.

[31] I therefore hold that the prosecution has proven as to the third element against all the accused in respect of the charge of trafficking under s 39B(1)(a) of the DDA.

[32] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a prima facie case against all the three accused in respect of the charge as preferred pursuant to s 180(3) Criminal Procedure Code (CPC) and I called upon OKT1, OKT2 and OKT3 to enter on their defence. All the three accused elected to give evidence on oath.

THE DEFENCE CASE

[33] The duty of a trial court at the conclusion of the defence case is set out in s 182A of the Criminal Procedure Code ('the CPC') which imposes an obligation upon the court to consider all the evidence to decide whether the prosecution has proved its case beyond reasonable doubt. I am aware that the principle should be followed by a trial court in the assessment and evaluation of the defence evidence is encapsulated in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 and as endorsed by the Federal Court *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203.

Defence of OKT1

[34] OKT 1 who is a Nigerian, aged 40 engages in a business of selling apparels testified that he was only assisting his friend Sylvester Chima to hand over the P8 together with the content therein to someone not known to him. The defence contended that although Sylvester Chima was not called as a witness but he is not a fictitious character. Refer to D31(6) and D34. OKT1 has no knowledge of the content of P8 as it belongs to Sylvester Chima. OKT1 was deceived by Sylvester Chima in the manner of which the drugs were kept in the biscuit box. Thus, the defence of OKT1 is truthful, consistent and inherently probable. and not a bare denial.

Defence of OKT2

[35] OKT2, a Nigerian, aged 30, a student at President International College, in his defence alleged that he has no custody or control and had no knowledge of the content of P8 because at any material time OKT 2 never held or kept P8. Prior to the arrest OKT2 denied he was in contact with PW3. There was no involvement nor common intention on his part in the charge of trafficking of the said drugs as he was not involved or present in the first meeting which took place in a car with the PW3 and OW4. He was requested by the OKT1 to meet up at the restaurant for the purchase of some clothing from OKT1. OKT2 only followed OKT1 to the car so that he could get a lift to Setapak Central Mall. These facts were supported by his cautioned statements ('D36') and OKT1's cautioned statement ('D39').

Defence of OKT3

[36] OKT3, a Ugandan, aged 27, a student at the Special Language Centre Subang Jaya also raised a defence that he has no custody or control and had no knowledge the content of P8 and at any material time never hold or kept P8. There was no involvement nor common intention on his part as to the charge of trafficking of the said drugs since he was not present at the first meeting in the car. OKT3 testified that he and OKT2 at that material time were at a Church at Jalan Ipoh for a choir practice. OKT3 had never met OKT1 before and he was only together with OKT2 at the restaurant to buy some clothing from OKT 1. OKT3 entered the car after he was asked to do so by OKT1 in view of getting a lift to Setapak Mall. OKT3 also denied knowing Sylvester Chima, Izuchukwu Orabueza, PW3 and DW4.

EVALUATION AND FINDINGS AT THE CLOSE OF DEFENCE

[37] The crux of the defence case is that the OKT1 was only carrying out the act of delivering P8 to PW3 upon the request of Sylvester Chima. He did not

know the contents of P8 and only doing the act in favour of Sylvester Chima. In other words, OKT1 insisted that he was an innocent carrier.

[38] There is established authority for the proposition that where a defence of innocent carrier is led, it necessarily raises the issue of 'wilful blindness'. In the case of *Pendakwa Raya lwn Klong K'Djoanh* [2016] MLJU 1644; [2016] 5 CLJ 533, it was held:

> It is the principle of the law that the defence of innocent carrier should be taken into account with the principle of wilful blindness.

[39] The concept of 'wilful blindness' is where the accused, who is not an innocent custodian in the sense that he is unaware of the package containing drugs and accepted it in circumstances which rendered the taking of the precaution of satisfying himself that the package was what they purported to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter. In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses (see *Roslan bin Sabu @ Omar v Public Prosecutor* [2006] 5 MLJ 244; [2006] 3 CLJ 607; [2006] 4 AMR 772 and more recently, in the case of *Jeanette Congcan Opena v Public Prosecutor* [2014] 1 LNS 508).

[40] From the foregoing, the doctrine of 'wilful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent for a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness' to what can be said to be fairly obvious. In other word, he is then taken to know what the contents are. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the drugs in question.

[41] From the evidence before me, it was revealed that OKT1 did not make any inquiries from Sylvester Chima as to the contents of P8 and neither did he have the trouble to inspect the two boxes of biscuits therein. Furthermore, P8 was not sealed and the contents were easily visible. OKT1 did not obtain any information as who is the recipient of P8, instead willingly to hand over P8 to PW3 without knowing the identity of the recipient. Under the circumstances, P8 ought to have aroused OKT1's suspicion as to its true contents. It ought to

have struck him that something was amiss the minute he was asked by Sylvester Chima to hand over P8 which according to him only contained two boxes of biscuits to PW3 who is a stranger to him. If it is true what he intends to hand over is just biscuits, he could have reasonably do so without entering the car. OKT1 could have easily hand over the biscuits to PW3 but he chooses to enter the car to complete the delivery. In this case OKT1 had every reason to be suspicious but choose to shut his eyes to the obvious danger.

[42] Under the circumstances, I find that the OKT1 either knew that what he was carrying was illicit drugs or that he was refraining himself from asking questions to Sylvester Chima who handed him the box. OKT1 also refrained himself from inspecting the contents because he knew that it contained dangerous drugs. This does nothing however to assist the defence in light of the fact that OKT1 had failed to inspect P8 which under the circumstances made him guilty of wilful blindness. Thus, I am unable to accept the defence of innocent carrier by OKT1 and applying the principle of 'wilful blindness', OKT1 was taken to know that he was carrying the impugned drugs.

[43] A perusal of the evidence led by the PW3 was that he had a prearrange meeting with OKT2 and OKT3 with the presence of DW4 in the car for a drug transaction. During the first meeting, PW3 testified that he has shown the money for the said drug transaction to OKT2 and OKT3. Having shown the money, OKT2 and OKT3 left the car and PW3 and DW4 waited for about two and half hours when OKT2 and OKT3 came back together with OKT1 who carried P8. It is without doubts that OKT2 and OKT3 have agreed to the transaction with PW3 and knew the contents of P8 because they were together with OKT1 in the car when OKT1 opened the box and showed the drugs to PW3. At this juncture, although OKT2 and OKT3 denied of such meeting but provide no evidence to support their story or call witness to verify their presence in the church and even there was no notice of alibi forwarded by them.

[44] I find that the defences of OKT2 and OKT3 are just bare denials and afterthoughts. If I were to believe such bare denial, I find that the facts did not add up when OKT2 and OKT3 came back for the second time to meet PW3 and DW4. How could PW3 recognised OKT2 and OKT3 if it was the first time he met both of them. PW3 has positively identified OKT2 and OKT3 were the person who he had negotiated for drugs transaction during the first meeting and this was also confirmed by DW4, the witness offered and called by the defence. The evidence of DW4 has reinforced the facts that there was a first meeting with OKT2 and OKT3 as testified by PW3.

[45] I also unable to reasonably believe that all the accused entered into the car on the pretext of getting a lift to Setapak Mall. It is ironic for OKT1 who had never met PW3 and DW4, a complete stranger to him, to request a lift to

the mall. A reasonable person would have requested permission from the driver before asking for a lift and there is no necessity to embark into the car to obtain such permission. I also find no cause to believe OKT2 and OKT3 that they entered the car just to get a lift to Setapak Mall. To accept such proposition, it is incomprehensible for a normal person to ask a lift from someone whom they had never met or have no prior acquaintances. On this premise, I find that such a defence is baseless and does not hold water. In *Ali Tan bin Abdullah v Public Prosecutor* [2013] 2 MLJ 676; [2013] 4 CLJ 757, Court of Appeal state that:

> Indeed, mere denial or presenting a bare story of innocence, such in the circumstances of the present case, cannot amount to reasonable doubts. The court's acceptance of explanation offered by an accrued person must be based upon reason and common sense, and cannot be illogical or irrational. The existence of reasonable doubt is dependent upon the totality of evidence and on as examination of all the evidence in a fair and reasonable manner and not in isolation.

[46] The reasonable conclusion here is that OKT1 together with OKT2 and OKT3 entered the car to conclude the sale of the drugs and not just to get a lift. The transaction was a pre-planned and well executed based on action taken.

[47] I am aware that the defence has raised some discrepancies with respect to the order of priority of all the three accused entering into the car, the place where the first meeting took place; in or outside the car, who provide the name 'Boy' and where about of the raiding team during the first meeting. The question here is whether the existence of those discrepancies is sufficient to destroy their credibility of the PW3 and DW4 and the prosecution's case. I have scrutinized each evidence very carefully as this involved the question of weight to be given to certain evidence in particular circumstances. What is vital here is that there was a first meeting, OKT2 and OKT3 were positively identified by PW3 and confirmed by DW4 and there was drug transaction by the same OKT2 and OKT3 together with OKT1 in the car during the second meeting. Thus, it is immaterial as to the sequence of the person who had entered the car first or whether the meeting took place in or outside the car and who provided the name 'Boy' to PW3. I find that those discrepancies are minor and not a serious one and have not cast any doubts on the prosecution case.

[48] The fact remained that all the three accused were caught red handed in the act of selling drugs and the act was done with common intention. This was a clear act of trafficking within the meaning of s 2 of the DDA. The definition of trafficking is wide enough to encompass the act of transporting, carrying, sending or delivering the said drugs. All the three accused were arrested in the car selling dangerous drugs. The defence of the three accused have under the circumstances and for the reasons expressed above failed to raise a reasonable doubt as to trafficking in the dangerous drugs as per the charge.

A CONCLUSION

[49] Having evaluated the prosecution and the defence case and as a finality, I find that the prosecution has proven beyond reasonable doubt and the defence failed to create a reasonable doubt in the prosecution's case. I have no
B doubts that OKT1, OKT2 and OKT3 were acting in furtherance of their common intention to complete the said drug transaction. Therefore, I find that OKT1, OKT2 and OKT3 are guilty and convicted as per the charge.

SENTENCE

C

[50] There was no material upon which I could have exercised a discretion under s 39B(2) and (2A) of the DDA to pass a sentence of life imprisonment and whipping since there was an involvement of AP. Therefore, I sentence OKT1, OKT2 and OKT3 to death by hanging as provided under s 39B(2) of
D the Dangerous Drugs Act 1952.

Accused convicted as per charged and sentenced to death by hanging.

Reported by Dzulqarnain bin Ab Fatar

E

F

G

H

I